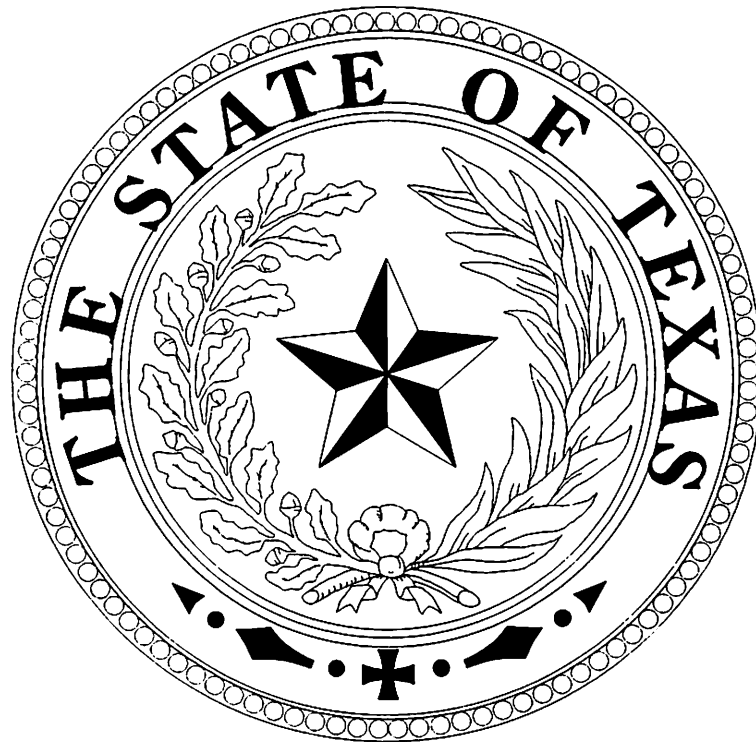


Thursday Afternoon
March 1, 2012
Essay Questions 7 - 12



TEXAS BAR EXAMINATION

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**If WRITING, answer Question 7 in the RED answer book.
If using LAPTOP, be certain you answer in the correct screen.**

QUESTION 7

Albert retained Brenda, a licensed, professional real estate agent, to list his house in Bexar County, Texas, for sale. As part of her initial inspection of the property, Brenda measured the house's square footage. She inadvertently calculated the square footage of the house as 3,000 sq. ft. when, in fact, the square footage was 2,500 sq. ft. Albert noticed the error in Brenda's calculation but did not correct it. With Albert's approval, Brenda listed the house for sale as having 3,000 square feet and with a sales price of \$250,000.

Cedric was shopping for a house and hired Brenda as his agent. Brenda arranged for Cedric to view Albert's house. During the viewing, Cedric told Brenda that the listing had interested him because of the house's location and size. While there, Cedric noticed that the floors appeared to be slightly warped and also saw cracks around some of the doors and windows. He asked Brenda if she thought the house had any foundation damage. Brenda told him that, in her opinion, the cracks appeared to be cosmetic and would likely have no effect on the house's value. Based on Brenda's statements, as well as the information he read in Brenda's listing, Cedric purchased the house for \$250,000.

Six months later, Cedric's employer required him to move to Atlanta. Cedric contacted Edward, a real estate agent, to list the house for sale. Before listing the house, Edward reviewed Brenda's listing from the previous year. After inspecting the house, Edward advised Cedric that the square footage in Brenda's listing was wrong and that the house was actually only 2,500 sq. ft. Edward hired a licensed inspector to inspect the house, and the inspector discovered the house's foundation was significantly damaged, and the damage would negatively affect the house's value.

Edward advised Cedric that, due to the size of the house and the damage to the foundation, the house's value was only \$190,000. Cedric was very upset at this news and became so stressed about the house's decreased value that he developed a painful ulcer, which required him to undergo treatment by a physician.

- 1. What claims, if any, may Cedric assert against Albert and Brenda under Texas consumer laws? Explain fully.**
- 2. What remedies, if any, are available to Cedric against Albert and Brenda under Texas consumer laws? Explain fully.**

If **WRITING**, answer Question 8 in the **LIGHT GREEN** answer book. If using **LAPTOP**, be certain you answer in the **correct** screen.

QUESTION 8

Nigel, a resident of Harris County, Texas, was the lead guitarist for a popular rock band. As his career progressed, he amassed a substantial estate which included assets valued at more than \$10,000,000. In November 2009, Nigel's tour bus was involved in a collision, and Nigel sustained a head injury. He was hospitalized, and released in early January 2010.

On August 1, 2010, Nigel's brother, Harold, filed a written application in the Harris County Probate Court to be appointed guardian of Nigel's person and estate. In support of his application, Harold filed an affidavit from a psychiatrist dated March 1, 2010, the relevant portion of which stated: "I have personally examined Nigel, and I have concluded that he has a severe mental condition that impairs his ability to make decisions for himself. His behavior is erratic and irrational. In my opinion, a guardianship would be in his best interests."

Nigel, through his attorney Lucy, contested the guardianship action. Lucy filed a motion to strike the psychiatrist's affidavit, arguing that it was legally insufficient. The Court granted Lucy's motion.

At the hearing on the application to create the guardianship, Harold's attorney called the psychiatrist who testified as follows:

- Following his head injury, Nigel's appearance had become unkempt, he sold his mansion, and he moved into a commune with the followers of a religious cult.
- On one occasion, Nigel gave \$10,000 as a gift to a vagrant he had met on the street.
- Nigel failed to attend band rehearsals and recording sessions on several occasions.
- Nigel fired his long-time manager and hired his girlfriend, a felon, to manage his career.
- In his opinion, appointment of Harold as Nigel's guardian would be in Nigel's best interests.

Lucy did not offer any evidence or testimony at the hearing.

The court dismissed Harold's application to establish the guardianship.

1. **Did the court err in granting the motion to strike the psychiatrist's affidavit? Explain fully?**
2. **Did the court err in dismissing Harold's application to establish a guardianship for Nigel? Explain fully?**

If WRITING, answer Question 9 in the YELLOW answer book. If using LAPTOP, be certain you answer in the correct screen.

QUESTION 9

Gwen requested Bug Busters Pest Control, Inc. ("Bug Busters") to inspect her home for pests. When Bug Busters discovered termites, Gwen contracted with Bug Busters to remove the termites and repair any damage caused by the termites. Bug Busters performed under the contract and invoiced Gwen \$4,500 for its work.

Gwen promptly mailed a check drawn on her account at Bank, which she signed as maker and made payable to Bug Busters for \$4,500. After the check was received, Bug Busters misplaced the check. Bug Busters explained this to Gwen and requested Gwen send them another check.

1. **Must Gwen issue another check to Bug Busters or otherwise pay for the work? Explain fully.**
2. **If Gwen refuses to issue another check or otherwise pay Bug Busters for the work, what recourse, if any, does Bug Busters have? Explain fully.**

Assume for the next two questions that the \$4,500 check Gwen sent to Bug Busters was stolen from Bug Busters' office by a thief who indorsed Bug Busters' name and cashed it at Bank. Bank debited Gwen's account for the \$4,500.

3. **If Gwen requests that Bank credit her account for the \$4,500, must Bank do so? Explain fully.**
4. **What recourse, if any, does Bug Busters have? Explain fully.**

If **WRITING**, answer Question 10 in the **BLUE** answer book. If using **LAPTOP**, be certain you answer in the **correct** screen.

QUESTION 10

Willie owned and operated a retail home appliance store. In order to obtain working capital, he borrowed \$50,000 from Friendly Bank ("Bank") and signed a security agreement, giving Bank a security interest in his currently owned and after-acquired inventory and equipment. Bank promptly and properly filed a financing statement with the Texas Secretary of State to perfect its interest.

When Soup for the Poor, a local charity, solicited donations, Willie gave Soup for the Poor a microwave oven from his inventory for use in their soup kitchen. Soup for the Poor had no knowledge of Bank's security interest.

Shortly thereafter, Willie began having cash-flow problems. In order to quickly raise cash, Willie offered to sell Ira a new built-in double oven from his inventory, at a 30% discount. Ira knew that the Bank had financed Willie's business. Ira gave Willie the cash and took possession of the oven.

Willie also owned a small, motorized cart that he used to move heavy appliances around the store. When Franklin expressed an interest in the cart, Willie offered to sell it to him for \$2,500. Franklin gave Willie \$2,500 and took possession of the cart. Franklin was unaware of any of Willie's dealings with Bank.

Do any of the following now own the goods they received from Willie free of Bank's security interest?

- 1. Soup for the Poor? Explain fully.**
- 2. Ira? Explain fully.**
- 3. Franklin? Explain fully.**

If **WRITING**, answer Question 11 in the **ORANGE** answer book. If using **LAPTOP**, be certain you answer in the **correct** screen.

QUESTION 11

Tim and Joan married in Texas in 2005. One child was born during the marriage. In 2010, Tim filed for divorce. Tim sought to be appointed joint managing conservator of the couple's child. Joan sought child support from Tim and also sought to be appointed sole managing conservator.

The trial was before the court without a jury. Joan testified to a number of acts of marital violence by Tim, including the following: (i) before she became pregnant, Tim grabbed her by the neck and threw her onto the bed at his mother's house; (ii) a week after the baby was born, Tim became angry at Joan, choked her, and pushed her into a closet; and (iii) when the child was two, Tim struck Joan in the jaw with his fist when Joan refused to let him hold the child. After this last incident, Joan had Tim arrested but decided not to press charges. She introduced a copy of the police report regarding the arrest, but the report was very vague about the facts and the reason for the arrest.

Joan also testified that, shortly after they separated in March 2008, Tim moved in with his mother and ceased to be employed at the mortgage company where he had worked since their marriage.

Tim denied that he was ever physically abusive to Joan. Tim also testified that: (i) his current income was zero; (ii) he had formerly worked as a mortgage associate earning \$20 per hour, but was laid off in 2008; (iii) since then he has worked at odd jobs but has been unsuccessful in finding permanent employment; (iv) he is a member of a singing group that performs concerts throughout the year for charity and only occasionally receives modest cash payments; and (v) he has expenses of \$2,000 per month for a car payment and other living expenses, which his mother helps him cover. Tim did not introduce any documentation to support his testimony about his income, his loss of employment, or job search efforts.

Tim's mother testified that she lived with the couple for a year during the marriage and she never saw Tim physically abuse Joan. She admitted she had seen the couple "get in verbal altercations," and she had intervened on those occasions.

Records produced from Tim's former employer stated that Tim "resigned" from his position as a mortgage associate in April 2008.

After considering all of the evidence, the court found that Tim was intentionally underemployed and ordered him to pay child support based upon his former earnings as a mortgage associate. The court also made a finding that Tim had engaged in family violence against Joan, denied his request to be appointed joint managing conservator, and appointed Joan sole managing conservator of their child.

- 1. Did the trial court abuse its discretion in finding Tim intentionally underemployed and ordering Tim to pay child support based upon his former earnings as a mortgage associate? Explain fully.**
- 2. Did the trial court abuse its discretion in making a family violence finding against Tim and appointing Joan sole managing conservator? Explain fully.**

If WRITING, answer Question 12 in the PURPLE answer book. If using LAPTOP, be certain you answer in the correct screen.

QUESTION 12

Gloria was 40 years old when she met Henry in February 2004. In August, Gloria discovered she was pregnant with Henry's child. In September, Henry agreed to marry her, but only on condition that she would sign a prenuptial agreement. On October 9, Henry presented Gloria with a prenuptial agreement, which listed certain of Henry's assets, valued at \$500,000. The prenuptial agreement provided that Gloria recognized those assets as Henry's separate property and that she would have no claim to them or the income from them during the marriage or in the event of divorce. Both signed the prenuptial agreement and they married the following day, October 10, 2004.

In December 2010, Henry filed for divorce. Neither side ascribed fault to the other for the divorce. At trial, Gloria challenged the enforceability of the prenuptial agreement. Her sole ground of challenge was that she had not signed it voluntarily, i.e., that the only reason she signed it was that she was forty, unmarried, pregnant, and with limited earning capacity, and that Henry would not have married her if she had not signed it. The trial court overruled Gloria's challenge and found the prenuptial agreement enforceable.

Other evidence at the trial showed that Henry was earning a monthly salary of \$10,000, whereas Gloria's sole source of post-divorce income would be from a retail clothing shop she owned, which produced net income of about \$1,000 a month.

The evidence also showed that there was other property valued at \$400,000 that was not covered by the prenuptial agreement. This other property included a \$300,000 savings account. The only evidence regarding the community or separate property character of the savings account was Henry's testimony. He testified that it was his separate property, but offered no corroborating evidence such as deposit slips or bank records to support his testimony. Gloria testified that she had no previous knowledge of the existence of the savings account.

The court did not actually characterize the savings account as separate or community property, but, relying on Henry's testimony, awarded the entire \$300,000 savings account to Henry. The trial court divided equally the remaining \$100,000 that was not covered by the prenuptial agreement.

1. Did the trial court err in finding the prenuptial agreement enforceable? Explain fully.
2. Did the trial court abuse its discretion in its division of the property not covered by the prenuptial agreement? Explain fully.

This concludes the Texas Essay portion of the exam.

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